D.P.U. 92-DS-23

Adjudicatory hearing in the matter of a possible violation of General Laws, Chapter 82, Section 40, by Fossile Construction Company.

APPEARANCES: Geraldine and Neil Fossile, Owners
Fossile Construction Company
268 Simpson Road
P.O. Box 676
Marlborough, Massachusetts 01752
FOR: FOSSILE CONSTRUCTION COMPANY
Respondent

Gail Soares, Dig-Safe Investigator
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On September 2, 1992, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Fossile Construction Company. ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on June 2, 1992 on McCabe Drive, Marlboro, Massachusetts in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The NOPV also stated that the Respondent failed to tender proper notification before excavating, and to use reasonable precautions during excavation, causing damage to an underground gas main operated by Commonwealth Gas Company ("Commonwealth Gas" or "Company"). The NOPV further stated that the Respondent had the right to either appear before a Division hearing officer in an informal conference on September 22, 1992, or send a written reply to the Division by that date.

On September 18, 1992, the Respondent sent a letter to the Division. In a letter dated October 14, 1992, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. On October 26, 1992, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on March 8, 1994 pursuant to the Department's procedures for enforcement of the Dig-Safe Law under 220 C.M.R. § 99.00 et seq.

At the hearing, Gail Soares, a Dig-Safe investigator, appeared on behalf of the Division. Paul Pouliot, a superintendent of technical services for the Company, and Edward Fletcher, foreman for distribution for the Company, testified in behalf of the Division. Geraldine and Neil

Fossile, owners the Fossile Construction Company, testified for the Respondent.[1] All exhibits offered were moved into evidence by the Department.

II. SUMMARY OF FACTS

A. The Division

The Division alleged that the Respondent failed to tender proper notification to Dig Safe System, Incorporated ("Dig-Safe"),[2] and use reasonable precautions while excavating on McCabe Drive in Marlboro, which resulted in damage to an underground gas main (Tr. at 4).

Mr. Pouliot stated that the Respondent punctured a gas main located between lots two and five on McCabe Drive with the tooth of a back-hoe on June 2, 1992 (id. at 6, 31; Exhs. D-1, D-2). Mr. Pouliot testified that the Respondent obtained a Dig-Safe number that became valid on April 1, 1992 (Tr. at 34-35; Exh. F-1). He also testified that the gas main in question was installed on April 28, 1992, approximately four weeks after the markings were placed at the site by the Company (Tr. at 35; Exh. D-1). Mr. Pouliot contended that because the newly installed facilities were not marked by the Company, any doubts as to the exact location of those facilities should have caused the Respondent to call for a re-marking of the entire site, or at least a marking of the new facilities (Tr. at 34-36).

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1 Ms. Fossile testified that she had not visited the site in question, and that her knowledge of the case came through discussions with her daughter, who did not testify at the hearing, and Mr. Fossile (Tr. at 11, 62). Accordingly, her testimony will be given limited weight by the Department in its decision.

2 Dig-Safe is a non-profit organization that exists for the express purpose of gathering information on proposed excavations from excavators, and disseminating that information to utility companies so that they can properly mark their underground facilities before excavation begins. See G.L. c. 82, § 40.

Mr. Fletcher testified that he visited the site in question within 15 minutes of being informed of the incident in question and found no markings in the area of damage (id. at 13, 19-21). He also testified the Respondent's employees and back-hoe were present at the location of damage when he arrived (id. at 15, 21) He further testified that the Company's facility was damaged by the tooth of the Respondent's back-hoe, and could not have been caused by a hand shovel (id.). Mr. Fletcher contended that because the Respondent was at the site during the Company's installation of the gas main in question, the Respondent should have known the location of that facility, and taken precautions to avoid damaging the facility such as hand-digging to expose the facility before using heavy machinery (id. at 15-16). Mr. Fletcher testified that the area in which damage occurred was not paved and could easily have been hand-dug (id. at 16). Mr. Fletcher asserted that the Respondent could also have avoided damage by asking the Company to relocate the new facilities before they were installed (id. at 36).

Mr. Pouliot testified that the Company has at least two employees who are authorized to accept requests for marking (id. at 58). He also testified that although the Respondent alleged that it contacted a company employee named David Sheridan to request markings, Mr. Sheridan was a salesman, and not authorized to respond to requests for Company markings (id. at 44, 58). Mr. Pouliot contended that the Complainant should have called Dig-Safe to be sure that all facilities in the area were marked (id. at 44).

B. The Respondent

Mr. Fossile testified that the Respondent properly requested a Dig-Safe marking for the site in question on McCabe Drive on April 2, 1992 (id. at 4). Mr. Fossile also testified that the Respondent worked at the site in question continuously after obtaining a Dig-Safe number (id. at 4, 54-55). Mr. Fossile further testified that he was informed by Dig-Safe that the Respondent did not need a second Dig-Safe number and marking if it maintained a continuous presence at the site (id. at 5, 44). In addition, Mr. Fossile testified that on June 2, 1992, in an attempt to be "extra" safe, the Respondent contacted a Company employee named David Sheridan, a salesman, to request a marking of the site, and that Mr. Sheridan stated that "it would be taken care of" (id. at 5, 44, 48).

Mr. Fossile stated that the Respondent was not working near the gas main in question, did not cause the damage in question, and did not call the Company to report a gas leak (id. at 25-27, 61). Mr. Fossile contended that the damage in question was caused by a faulty connection between pipes and a lack of proper depth, and not by the Respondent (id. at 5, 27, 61). Mr. Fossile also contended that the facility in question was not installed at the proper depth (id. at 39, 55, 60-61). In addition, Mr. Fossile contended that the Company was made aware of the leak in question when one of its leak-detecting trucks was in the vicinity of McCabe Drive and detected the leak (id. at 5, 25-26, 48).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states, in pertinent part:

> No person shall... contract for, or make an excavation...in any public way, any public utility right of way or easement, or any privately owned land under which any public utility company, municipal utility department, natural gas pipeline company, or cable television company maintains underground facilities, including

> pipes, mains, wires or conduits, unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays, but not more than thirty days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such natural gas pipeline companies, public utility companies, cable television companies and municipal utility departments as supply gas, electricity, telephone or cable television service in or to the city or town where such excavation is to be made. Such notice shall set forth the name of the street or the route number of said way and a reasonably accurate description of the location in said way or on private property the excavation is to be made...If any such notice cannot be given as aforesaid because of an emergency, it shall be given as soon as may be practicable.

The Department has found that a contractor's notice must adequately name the street of the proposed excavation, and give a reasonably accurate description of the location where the excavation is to be made. Weston Geophysical Corporation, D.P.U. 89-DS-115 (1993); Boston Gas Company, D.P.U. 88-DS-3 (1990). The Dig-Safe Law assigns to the company the responsibility to mark the location of all company facilities in the area of the proposed excavation.

The Department has found that when an excavator contacted company employees that were not authorized to receive notice on the part of the utility company, proper notification had not been rendered. Chandler Construction Company, D.P.U. 87-DS-104 at 4-5 (1990). The Department also has found that when new underground facilities were installed at a site previously marked by Dig-Safe, no new markings were required if the new facilities were marked by the Company upon installation. Methuen Construction Company, D.P.U. 86-DS-15 (1990). In addition, the Department has found that an excavator who maintained a continuous presence at a previously marked site where a new underground facility was installed, but did not contact Dig-Safe or authorized company personnel to have that facility marked, was in violation of the Dig-Safe Law. Construction Solutions, Inc., D.P.U. 89-DS-17 (1993).

G.L. c. 82, § 40 also states in pertinent part:

> Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in this area. Several recent cases have established the proposition that using a machine to expose facilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc., D.P.U. 89-DS-15 (1990); Petricca Construction Company, D.P.U. 88-DS-31 (1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc., D.P.U. 87-DS-54 (1990). However in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp., D.P.U. 91-DS-2 (1992).

A variation in depth does not relieve an excavator from its duty to use reasonable precautions. Fed Corp, supra; Amorello, D.P.U. 89-DS-61 (1990). However, the depth of an underground facility may be relevant in certain cases when that depth may have limited the precautions an excavator could have taken to protect underground facilities. Amorello & Sons, D.P.U. 87-DS-148, at 7-8 (1993); New England Excavating, D.P.U. 89-DS-116, at 6-7 (1993).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must

accompany that allegation. New England Excavating, supra, at 9; Fed. Corp., supra, at 5-6. In specific instances where there has been an allegation of a failure to exercise reasonable precaution without demonstrations of precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro & Sons, D.P.U. 91-DS-4 (1992); Fed. Corp, supra; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

IV. ANALYSIS AND FINDINGS

The issues to be decided in this case are whether the Respondent failed to tender proper notification and use reasonable precautions while excavating.

In addressing the issue of whether the Respondent failed to tender proper notification to the Company before excavating, the record indicates that the Respondent possessed a Dig-Safe "number" that became valid on April 1, 1992. The Division presented testimony and evidence that the gas main damaged by the Respondent was installed by the Company on April 28, 1992, approximately four weeks after the Company's Dig-Safe markings were laid. Damage to this new gas main occurred on June 2, 1992. The Division contended that the Respondent should have contacted the Company or Dig-Safe to mark the location of the new gas main.

The Department has found that when new underground facilities are installed at a site previously marked by Dig-Safe, no new markings are required if the new facilities were marked by the company upon installation. See Methuen Construction Company, D.P.U. 86-DS-15 (1990). Here, the new facilities were not marked by the Company upon installation.[3] The Department has

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[3] Pursuant to the Dig-Safe Law, companies are not required to mark facilities upon installation. However, in situations where new company facilities have been installed

also found that when new underground facilities are installed at a site previously and properly marked, and those new facilities are not marked by the company, Dig-Safe markings for the new facilities are required. See Construction Solutions, supra. Here, evidence was presented that the Respondent contacted a person at the Company to mark the new facilities, but that person was not authorized to mark facilities. The Respondent was responsible for notifying authorized Company personnel or Dig-Safe in order to ensure the safety of the new facilities. See Construction Solutions, supra, at 5; See also Chandler, supra, at 4-5. The Dig-Safe Law was enacted in order to prevent persons unauthorized to mark sites from doing so, in order that the excavator will not erroneously rely on markings which may be incorrect. See Construction Solutions, supra, at 5-6.

In addition, although the Respondent contended that it called Dig-Safe and was told that it was not required to obtain a new Dig-Safe number for work on an "on-going" site, the Respondent did not present the person who had contacted Dig-Safe at the adjudicatory hearing.[4] Moreover, after new facilities are installed, the status of the site is changed. As such, proper markings for the new facilities must be laid before any excavation can take place in the area of the new facilities, as required by the Dig-Safe Law. See Construction Solutions, supra, at 5-6.

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at an excavation site that has been previously marked, or where excavation is "on-going" whether the site has been previously marked or not, the Department recommends that companies mark those facilities upon installation, and use authorized personnel to do so.

[4] Any testimony concerning comments made by that person or to that person by a Dig-Safe representative are hearsay, and as such cannot be given substantial weight by the Department without adequate supporting evidence. The Respondent did not present adequate supporting evidence.

Accordingly, for the above reasons, the Department finds that the Respondent has failed to provide proper notice.

In addressing the issue of whether the Respondent failed to use reasonable precautions, the Division alleged that the Respondent should not have used a back-hoe to expose the underground facility, and instead should have dug by hand to determine its exact location. Although the Respondent contended that it was not working at the site in question when the damage in question occurred, substantial evidence presented by the Division demonstrates that the Respondent was working at the site with a back-hoe at that time. In addition, while the Respondent contended that the damage was caused by poor "fusion" of pipes during installation, substantial evidence presented by the Division demonstrates that the damaged facility was a solid pipe with no fusion points.[5] Aside from the aforementioned contentions, the Respondent presented no evidence or testimony that it had used reasonable precautions while excavating at the site in question. Therefore, the Department finds that the Respondent did not use reasonable precautions while excavating.

Accordingly, the Department finds that the Respondent failed to provide proper notification when it did not request a marking of the newly installed facilities, and failed to use reasonable precautions when it did not hand-dig to expose the new facilities at when excavating on June 2, 1992 on McCabe Drive, Marlboro, Massachusetts, and therefore, violated the Dig-Safe Law.

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[5] The Division also stated that a second break in close proximity to the site in question contained a fused joint that may have been defective, but testified that all of the Respondent's testimony regarding a faulty installation pertained to that break and not the break in question.

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Fossile Construction Company violated the Dig-Safe Law on June 2, 1992 during excavation on McCabe Drive, Marlboro; and it is

ORDERED: That Fossile Construction Company, being a violator of the Dig-Safe Law, shall pay a civil penalty of $500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,

_____
Kenneth Gordon, Chairman

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Barbara Kates-Garnick, Commissioner

_____
Mary Clark Webster, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971)